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Ohio SB 52 – Local Stakeholders Gain Leverage On Ohio Wind and Solar Projects

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In July of this year, Ohio governor Mike DeWine signed Senate Bill 52 (SB 52) into law, which for the first time gives a local board of county commissioners the authority to block the development of large-scale wind and solar facilities in its jurisdiction.

The new law, which will take effect on October 11, 2021, promises to make significant changes to the approval process for wind and solar projects in Ohio. Under existing law, all utility-scale energy producers must be approved by the Ohio Power Siting Board (OPSB), which requires the plans for those projects to undergo an extensive review process. For wind and solar projects, however, SB 52 adds another layer to that approval process by making those projects subject to local control at the county level.

The key hurdles imposed by SB 52 are summarized below.

County Restricted Areas

Under the new law, a board of county commissioners may adopt a resolution designating all or part of an unincorporated area of the county as a “restricted area” where the construction of an economically significant wind farm, a large wind farm, or a large solar facility is prohibited. R.C. 303.58(A). The board of county commissioners must provide at least 30-days advance notice to the public of any meeting to consider a resolution designating a restricted area and post a map showing the boundaries of the proposed restricted area at all public libraries within the county. R.C. 303.58 (C)(2).^[1]

An “economically significant wind farm” includes a wind farm capable operating between 5 and 50 megawatts. A “large wind farm” or “large solar facility” applies to a wind farm or solar facility capable of operating

at 50 megawatts or more. R.C. 303.57 (A) and (B).

A county resolution to create a restricted area will take effect 30 days after its adoption. R.C. 303.59. The resolution may also be challenged by a petition and referendum process set forth in the act. Id.

A resolution establishing a restricted area is binding on the OPSB. The OPSB is prohibited from accepting an application for a certificate, or a material amendment to an existing certificate, to construct, operate, or maintain a utility facility in a restricted area where the construction of such a utility facility is prohibited by the resolution. R.C. 303.60

County Level Public Meetings and Review Prior to OPSB Certificate

SB 52 also introduces a new public meeting requirement and permits the local board of county commissioners to adopt a resolution prohibiting or limiting the project's development.

At least 90 days, but not more than 300 days, prior to applying to the OPSB for a certificate or a material amendment to an existing certificate, an applicant must hold a public meeting in each county where the utility facility is to be located. R.C. 303.61(A). The applicant must provide written notice regarding the meeting to the board of county commissioners and the boards of trustees of every township within the county in which the utility facility is to be located at least 14 days prior to the meeting. R.C. 303.61(B). At the public meeting, the applicant must provide specific information about the project including: (1) the facility type (economically significant wind farm, large wind farm, or large solar facility), (2) the maximum nameplate capacity for the facility, and (3) a map of the proposed boundaries of the project within the county. R.C. 303.61(C).

Following the required public meeting, the board of county commissioners has 90 days to act, which can include: (1) adopting a resolution prohibiting construction of the facility, or (2) adopting a resolution limiting the size of the facility to a smaller geographic area. R.C. 303.62(A). If no resolution is adopted by the board of county commissioners within this 90-day period, the applicant may proceed with the OPSB process. R.C. 303.62(B).

If, on the other hand, the board of county commissioners adopts a resolution, that resolution is binding on the OPSB, meaning that a certificate or material amendment to an existing certificate cannot be granted by the OPSB in violation of the resolution. In that case, the applicant could still ask the board of county commissioners to consider another proposal regarding the project at a later date. R.C. 303.62(C).

Selection of new ad hoc voting members for OPSB

SB 52 also adds two "ad hoc" voting members to the OPSB to consider applications for large scale wind and solar facilities in order to represent the interests of the residents of the area in which the facility will be located. R.C. 4906.02(A)(2); R.C. 4906.021. The new ad hoc voting members include: (i) the chairperson of the board of township trustees or the chairperson's "designee", and (ii) the president of the board of county commissioners or the president's "designee." If a facility will be located in multiple townships, the ad hoc member to represent the townships shall be chosen by a majority vote of all of the boards of township trustees of the townships in which the utility facility will be located. Likewise, if a facility will be located in multiple counties, the ad hoc member to represent the counties will be chosen by a majority vote of all of

the boards of county commissioners of the counties in which the utility facility will be located. R.C. 4906.021 (C).

Certain Existing Projects Grandfathered

SB 52 provides that it does not apply to certain pending wind and solar projects, effectively “grandfathering” those projects. See Sections 3, 4, and 5 of S.B. 52.

For solar projects, SB 52’s requirements do not apply to applications to OPSB for a certificate or for a material amendment to an existing certificate where, as of the bill’s effective date, the facility (i) is in the PJM new services queue at the time the application is found by OPSB to be complete, and (ii) has received a completed system impact study from PJM and paid PJM the applicable fees. Solar projects, which meet these requirements, are grandfathered and are not subject to the county’s review. Section 4 of SB 52.^[2]

For wind projects, SB 52’s requirements do not apply to applications for a certificate, or material amendment to an existing certificate, that as of 30 days after the bill’s effective date, have received a letter of completeness from the OPSB. Wind projects deemed complete by OPSB within 30 days after the bill’s effective date are grandfathered and are not subject to the county’s review. Section 3 of SB 52.

Decommissioning Plan

The law also adds a new requirement for a decommissioning plan.

SB 52 requires an applicant for a certificate or a material amendment to a certificate for a utility facility to submit to OPSB, at least 60 days before construction, a comprehensive decommissioning plan. R.C. 4906.21 (B). The plan must be prepared by a professional engineer, and include (i) a list of all parties responsible for the decommissioning, (ii) a schedule of decommissioning activities, not to extend beyond 12 months from the date the facility ceases operation, and (iii) an estimate for the full costs of decommissioning, without taking into account the salvage value of any materials from the facility. R.C. 4906.211. The applicant must also post a performance bond before construction may begin in order to ensure that funds are available for the decommissioning of the facility, and identify OPSB as the obligee on the bond. R.C. 4906.22.

The Consequences of Enhanced Local Control

SB 52 will have a significant impact on renewable energy projects in Ohio. Because SB 52 applies exclusively to wind and solar projects and does not restrict other forms of energy development (i.e., fossil fuels or nuclear power), it places wind and solar projects at a distinct disadvantage by requiring those projects to clear hurdles not applicable to energy projects in other sectors.

The legislation also promises to give local governments, in particular counties, greater control over the development of wind and solar projects. Prior to the new law, counties and other local stakeholders, if they had concerns, could voice their opinions before the OPSB. Counties could also decide whether to adopt a resolution approving a wind or solar project’s application to be certified as a qualified energy project under RC 5727.75 (which grants a qualified energy project certain real and personal property tax exemptions in exchange for a PILOT payment). SB 52 expands the county’s role considerably. It not only gives the county (and township) a larger voice before the OPSB, it grants the county, through its board of county

commissioners, the authority to block or limit the development of wind and solar projects in its jurisdiction.

By providing greater local control, SB 52 places a premium on decisions at the county level. It will incentivize residents and property owners who may be impacted by a wind or solar project to address those concerns with their local elected representatives. It will also make it essential for developers of any wind or solar project to work closely with county officials to build support for the project. Once the law goes into effect, each county reviewing a wind or solar project (not otherwise grandfathered under the statute) will be faced with a choice of how best to balance the competing interests among stakeholders.

With all the changes under SB 52 impacting wind and solar projects in Ohio, it is essential that developers understand and carefully consider how to navigate the new compliance requirements.

[1] The board of county commissioners must also provide additional written notice by first class mail of the restricted area to all school districts, municipal corporations, and boards of township trustees located in whole, or in part, within the boundaries of the proposed restricted area. R.C. 303.58 (C)(2)(c).

[2] There are special rules that apply if, after SB 52 becomes effective, a large solar facility (i) submits a new queue position for an increase in its capacity interconnection rights (which is permitted without local approval provided that the change in rights occurs without increasing the facility's nameplate capacity), or (ii) files an additional new service request with PJM, pertaining to the same facility that is in the new services queue (in which case, the application is subject to review by the local board of county commissioners). See Division (C) and (D) of Section 4 of S.B. 52.